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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

BENNO BARTELS.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

T. E. Mosheim,
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BENNO BARTELS.

BRIEF FOR RESPONDENT.

Statement of the Case.

On December 2, 1937, Benno Bartels, the respondent, being unable to meet his obligations as they matured, filed his petition with the District Court for an extension of time under the provisions of Section 75 of the Bankruptcy Act as amended. The petition was granted and the case referred to the conciliation commissioner (R. 2).

On December 21, 1937, at a creditors' meeting duly called, the respondent, Benno Bartels submitted a proposal for *payment and* an extension of time. All of the creditors present agreed to the extension except the appellant, the majority *in amount* creditor, the John Hancock Mutual Life Insurance Company (R. 3, 4 and 56).

After having failed to get the consent of a majority in amount of his creditors, the respondent, Benno Bartels, amended his petition, asking to be adjudged a bankrupt, under subsection (s) of said Section 75 as amended. On January 10, 1938, the court entered its order adjudging the respondent a bankrupt and appointed a referee (R. 4, 5, 6 and 7).

Thereafter the debtor's petition was dismissed by the District Court on motion of the John Hancock Mutual Life Insurance Company, but upon reconsideration the court reinstated the petition. Thereupon, in accordance with the suggestion of the District Court, the John Hancock Mutual Life Insurance Company made a motion to set aside the order of adjudication and to dismiss the debtor's petition, which motion the court granted (R. 7, 8, 9, 10, 11, 12, 13, 14, and 99).

From the District Court's order of dismissal the respondent, Benno Bartels, appealed to the Circuit Court of Appeals of the Fifth Circuit, which court reversed the District Court. The case is now before this Court on an appeal by the John Hancock Mutual Life Insurance Company.

The respondent, Benno Bartels, is the owner of 100 acres of improved farm land in Guadalupe County, Texas. On this land he has a modern home and other buildings necessary to operate the farm as a going concern. He paid $200 an acre, or $20,000, for this farm. Under present conditions this farm is conservatively valued at $100 an acre, or $12,000 (R. 8, 31, 71, 72, 95 and 96).

On this farm the John Hancock Mutual Life Insurance Company has a first mortgage, on which there is due $8,195.37. This includes the surprising amount of $745.03 attorneys' fees (R. 9). The respondent also owns two lots in San Antonio, Texas, for which he paid $510, and which he values at $500. These lots are free from encumbrances (R. 47).

The respondent is also the owner of household furniture, a Chevrolet automobile, a tractor and other farm equipment. There is something over $1,800 due him on account from other parties (R. 47, 48, 57 and 62). His total indebtedness other than that due to the John Hancock Mutual Life Insurance Company is $2,100 (R. 3).

According to the Agricultural Agent for Guadalupe County, the soil of this farm is the most fertile in Guadalupe County. Mr. Bartels complies wth the Program of the Agricultural Extention Department of the A. and M. College. He uses a tractor and raises corn and cotton as his principal crops. He had 120 Barred Rock hens, 150 to 200 baby chicks, a brood sow and three other hogs, two cows, an orchard of peaches and plums and some pecan trees. The Agent feels that the income from the farm should be in the neighborhood of $100 a month (R. 73, 74, 75, and 84).

Mr. Bartels proposed to pay all of his creditors in full, but asked for an extention of time in which to meet his obligations (R. 49). He proposed to sell the San Antonio lots and apply the proceeds and $200 that he expected from the sale of his interest in a store, together with what he could collect out of $1,500 of accounts due him from others, to the John Hancock Mutual Life Insurance Company, but it declined the proposal (R. 56, 57, 65, 66, and 67).

The evidence shows conclusively that Mr. Bartels acted in good faith. There is not one syllable anywhere in the record that Mr. Bartels was acting in bad faith. In fact the record is replete in showing that he is an honest, hard working, conscientious person who wishes to pay his debts in full (R. 49 to 66, inclusive).

The District Court set aside the adjudication under Section 75 (s) and dismissed the debtor's petition. This principally because the court concluded that the debtor could not be rehabilitated, and therefore acted in bad faith. The

court held that good faith meant more than the absence of actual fraud. After having thus held that good faith could be bad faith, the court held that a *bona fide* effort to compromise with creditors is made a prerequisite to the relief afforded under Section 75 (s). The District Court below cites authority for its erroneous decision, but fails to point out wherein Section 75 gives it or any other court such authority (Opinion of the District Court, R. 99 to 108, inclusive).

Question Involved.

The principal and ultimate question involved in this case is whether the intent of Congress, as expressed in unambiguous language, is to control, or whether some District Courts can so disregard or misconstrue and twist the language as to defeat the clear intent of Congress. In other words, the question is whether lower courts may, by judicial legislation, annul an Act of Congress that they do not agree with, although the Act has been held constitutional by this Court. There is no room for construction in the case at bar. The language in Section 75 speaks clearly for itself on the issue here involved.

The question is not what some of the District Courts have attempted to read into the Act but what the Act itself says. There is no need of searching books to find what the Act means. Its terms are *unambiguous and clear.* Whether the Act is wise or unwise is the *responsibility of Congress, not* of the District Courts. Their duty is to give full force and effect to the Act so as to carry out the evident intent of Congress.

Statute Involved.

The statute involved is Section 75 of the Bankruptcy Act. The District Court below set aside the adjudication and dismissed the farmer-debtor's petition for reasons stated above. The Circuit Court of Appeals of the Fifth Circuit

reversed the District Court's decision. We feel that the *mere reading* of those portions of Section 75 that are involved in this case will satisfy this Court that the reasoning and the decision of the Circuit Court below, when it reversed the District Court, is correct.

The applicable portions of Section 75 are here set forth:

Bankruptcy Act, Section 75, U. S. C., Sup. 4, Title 11, Section 203, subsections (c), (g), (n), (p) and (s).

"(c). *At any time* prior to March 4, 1940, a petition may be filed *by any farmer*, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. . . .

. . . . . .

"(g). An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, *by a majority in number* of all creditors whose claims have been allowed, including secured creditors whose claims are effected, which number shall represent *a majority in amount* of such claims.

. . . . . .

"(n). The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, *shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court,* including all real or personal property, or any equity or right in any such property, . . .

. . . . . .

"(p). *The prohibitions* of subsection (o) *shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to*

all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor-farmer's creditors, as provided for in this section.

* * * * * * *

"(s). *Any farmer failing* to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or *if he feels aggrieved* by the composition and/or extension, *may amend his petition* or answer, asking to be adjudged a bankrupt. *Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property* wherever located, whether pledged, encumbered, or unencumbered, *be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession,* under the supervision and control of the court, *of any part or parcel or all of the remainder of his property, including his encumbered exemptions,* under the terms and conditions set forth in this section. *Upon such a request being made, the referee,* under the jurisdiction of the court, *shall designate and appoint appraisers,* as provided for in this Act. *Such appraisers shall appraise all of the property of the debtor,* wherever located, *at its then fair and reasonable market value. The appraisals shall be made in all other respects* with rights of objections, exceptions, and appeals, *in accordance with this Act:* Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1). *After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his* unencumbered *exemptions,* and his unencumbered interest or equity in his exemptions, as prescribed by

the State law, *and shall further order that the possession,* under the supervision and control of the court, of any part or parcel or all of the remainder *of the debtor's property shall remain in the debtor,* as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2). *When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings* in any court, or under the direction of any official, against the debtor or any of his property *for a period of three years. During such three years the debtor shall be permitted to retain possession* of all or any part of his property, in the custody and under the supervision and control of the court, *provided he pays a reasonable rental* semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of *such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property.* Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors and applied on their claims, as their interest may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, *may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations* of the debtor, such sale to be had at private or public sale, and *may,* in addition to the rental, *require payments on the principal due and owing by the debtor* to the

secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semi-annually or annually, not inconsistent with the protection of the rights of the creditors, and *the debtor's ability to pay, with a view to his financial rehabilitation.*

(3). *At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession,* including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on the principal: *Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal* of the debtor's property, or in its discretion, set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, *and the debtor shall then pay the value so arrived at into court, less payments made on the principal,* for distribution to all secured and unsecured creditors, as their interests may appear, *and thereupon the court shall,* by an order, *turn over full possession and title of said property, free and clear of encumbrances to the debtor:* Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum, interest, into court, and he may apply for his discharge, as provided for by this Act. *If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.*

(4). * * * *If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged*

a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession and the property returned to the possession of such farmer, under the provisions of this Act. * * *

(5). This title shall be held to apply to all existing cases now pending in any Federal court, under this section, as well as to future cases. *All cases* under this section *that have been dismissed* by any conciliation commissioner, referee, or Federal court because such Court erroneously assumed or held that subsection (s) of this section was unconstitutional, *shall be promptly reinstated,* without any additional filing fees or charges. *Any farm debtor* who has filed under the General Bankruptcy Act *may take advantage* of this section upon written request to the court; and a *previous discharge* of the debtor under any other section of this title *shall not be grounds for denying him the benefits* of this section.

Argument.

At the outset we feel that it is our duty to inform the Court that Congressman Lemke appears in this case as one of the attorneys for the respondent without compensation, the same as he has done in every other case that he participated in before this Court. He does so as a public servant, feeling that Acts of Congress should be respected and uniformly enforced by all the District Courts.

History.

Section 75 of the Bankruptcy Act was originally passed in the closing days of the Hoover Administration, in March, 1933. The present Frazier-Lemke Amendments were added and became a law on August 28, 1935. Contrary to the general belief, the Frazier-Lemke Amendments did not only add subsection (s), but also amended existing subsections (b), (j), (k), (n) and (p) of Section 75, as well as adding subsection (s).

Subsection (r) was later amended by another Act because of too strict a construction by some District Courts as to what constituted a farmer. Other amendments have since been made, and there is another amendment, (S. 1935), pending before Congress, which has already received the approval of the Judiciary Committee of the Senate.

Provisions Mandatory.

The provisions of subsection (s) *are mandatory*, and while the *stay of three years is not absolute, the statute itself provides the exception. No court has authority* to dismiss the debtor's petition *because his liabilities exceed his assets*, or because it, the court, concludes that the debtor cannot be rehabilitated, and that, therefore, his petition is in bad faith. *To do so is reading something into the statute that is not there.* It is judicial legislation. In such a case the bad faith is not with the debtor but is elsewhere.

In re Chicago, Rock Island & Pacific Ry. Co. (7 C. C. A.), 72 F. (2d) 443, the court said:

> "Congress having the express authority to enact legislation on the subject matter of bankruptcy, was the sole judge of the means and their appropriateness to the purpose of the legislation so long as said means did no violence to the Constitution."

The farmer-debtor *has an absolute legal right* to file his petition under Section 75 (c), and if a majority of the creditors in number and amount refuse to agree to a composition or extension of time then he *has an absolute right* to ask to be adjudicated a bankrupt. *No court may deny him that right or dismiss* his petition *without his consent* (75s).

Of course we concede that a court of equity can dismiss a petition for abandonment, want of prosecution or proven fraud, *not assumed bad faith*, or where the petitioner is not a farmer within the meaning of the statute. These are the

only exceptions and the court may do this under its general equitable power. This is a power that the courts have always, and can, exercise even though Section 75 is silent on the subject. But in bankruptcy cases courts *do not usually dismiss petitions.* They *wind up the estate and liquidate it.*

Section 75 of the Bankruptcy Act deals with *Agriculture.* It is *not a part* of Sections 74, 77 or 77 (b). These Sections have been dealt with *separately and differently. Separate* and *independent hearings* have been held on them by the Judiciary Committees of both the House and the Senate. These Sections deal with *different subjects—with different types of corporations, organizations, persons and property.* No court is justified in using part of the language of Sections 74, 77 or 77 (b) as if it were part of Section 75.

Unfortunately, some courts have assumed that the language used in Sections 74, 77 and 77 (b) was part of Section 75. Under Sections 74, 77 and 77 (b), good faith, lack of fraud, etc., are made the basis of the proceeding. In these Sections Congress gave the court discretionary power *that it denied* the court in *Section 75.* The hostility with which Section 75 has met is ample proof that Congress knew what it was doing when it made the provisions *more mandatory* than in the other Sections.

> "The sale contemplated by Section 75 (s)-3 *is authorized only at the end of the moratorium period.* A petition to dismiss the proceeding, and another to dissolve the injunction against the foreclosure of the mortgage, have been denied by one of my colleagues; and the section of the Act under which the proceeding was instituted has provided no distinct method of disclaimer on the part of the court." *In re McIntyre,* 23 Fed. Supp. 342.
>
> "Section 75 (s) (3) fails to disclose any authority in this court to dismiss this proceeding or to strike from

the schedule the lands involved, were it established that the debtor will be unable to refinance himself within three years." *In re Lines*, C. C. H. 51, 605.

Never Too Poor For Bankruptcy.

Surely, it is ridiculous to say that a farmer *is too poor* to go through bankruptcy or to take advantage of the benefits of Section 75. There is no room for even a difference of opinion here. If the District Court below had only carefully read Section 75, it would have seen the untenableness of its position. To say that the farmer debtor cannot take advantage of this Act because his liabilities exceed his assets *and therefore he has no financial equity*, or because the court thinks he cannot be rehabilitated is *to do violence to the language of the Act. Congress decided that question. It is not for the courts.*

The Act specifically *states* that an appraisal is to be made of all of the farmer's property "*at its then fair and reasonable market value.*" That is to say that the reasonable market value *fixes the debtor's assets and also the limit* of his liabilities. That is the rule in all bankruptcy proceedings as far as liabilities are concerned. *It is not what* the bankrupt *owes but* what the property *brings* that finally settles the question of assets and liabilities, and balances the debit and the credit sides of the ledger. This via a discharge.

It then *provides* that *the farmer is* to remain in *possession for a period of three years* and pay the "usual and customary rental," on the *appraised* value, which rental is to be fixed by the court, and it provides further that if it becomes necessary, to protect the creditors, the court may require additional payments, according to the *debtor's ability to pay* with a *view to his rehabilitation. Nowhere does the Act provide* that the District Court may shirk its duty and responsibility, *and dismiss the proceedings.*

If any further proof is required to show that Congress intended that the farmer debtor's liabilities should be limited to the reasonable market value of his property "the same as in general bankruptcy proceeding" then let us cite Section 75 (k):

> "(k) * * * Provided, however, That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor *below the fair and reasonable market value* of the property securing any such lien at the time that the extension and/or composition is accepted, *but nothing herein shall prevent the reduction* of the future rate of interest on all debts of the debtor, whether secured or unsecured."

The court will notice that the Act protects the creditors *up to the fair and reasonable market value* of the property at the time the extension and composition is accepted. The court will note that it provides further that the rate of interest *may be reduced* on that fair and reasonable market value on all debts of the debtor, whether secured or unsecured. There is *no suggestion* that the *unfortunate bankrupt farmer is to pay all of his obligations in full.* The intent of Congress *is clearly to the contrary.* It intends that a debtor give *all that he has, and no more.* That is as true under Section 75 as under General Bankruptcy.

In Section 75 (n) the intent of Congress is too clear for dispute. Congress intends to protect the farmer debtor in his possession and in his property until a composition and extension has been agreed upon, or until he files his Petition in Bankruptcy under Subsection (s). The language is so clear that we fail to understand how the District Court could misconstrue it. May we also call this Court's attention to the fact that the Act provides specifically that the procedure shall be the same as if a voluntary petition in General Bankruptcy had been filed.

Whoever heard of a court *dismissing* a voluntary petition *because* the bankrupt had *no equity* left in his property—*because* his *liabilities exceeded his assets*, or because the bankrupt was *unable to pay his debts in full*, or *too poor* to go through bankruptcy. Such a suggestion would be considered absurd, and it is *equally absurd* under Section 75.

Cannot Surrender Jurisdiction.

Again the court will note that in subsection (p) Congress intended to have all of Section 75 apply to *all debts, public and private*, and to *all the debtor's property*. It placed all the debtor's property under *the sole jurisdiction and control* of the court. The District Court does violence to the language in this paragraph when it dismisses the action, and attempts *to surrender its jurisdiction and control*.

> "For the court to afford the relief which the section as amended contemplates, it is necessary that the *exclusive* and *paramount jurisdiction* of the court *over* the *property* of the bankrupt *be maintained*; and there can be no question but that the provisions of subsections (n) and (o) apply as well to proceedings continued under subsection (s) as to proceedings under the other provisions of section 75. * * * And we do not think that the right to stay proceedings in the State court is precluded because a sale has taken place in foreclosure proceedings if there has been no confirmation of the sale." *Bradford* v. *Fahey*, 76 F. (2d) 628 (C. C. A.-4th).

When a farmer debtor comes into a Court of Bankruptcy, he comes into a Court of Equity. He *has a legal right* to ask for *a three year period* in which to refinance himself upon paying a reasonable rental and complying with other lawful orders of court. This *right* the District Court *may not deny him*. The court cannot escape the duties placed upon it by the Act, by dismissing the case.

> "Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in

the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, State or Federal. Isaacs *v.* Hobbs Tie & T. Co., 282 U. S. 734, 737, and cases cited. Such jurisdiction having attached control of the *administration of the estate cannot be surrendered even by the court itself. Id.*, 739. *'The filing of the petition is a caveat to all the world and in fact an attachment and an injunction.'* May *v.* Henderson, 268 U. S. 111, 117." *Gross* v. *Irving Trust Co.*, 289 U. S. 342.

Section 75 (s).

This section seems to have been the stumbling block of some District Courts. *Every conceivable* attempt has been made *to destroy its effectiveness.* Yet, there is nothing new in this section. It simply applies old and well understood principles of law to Agriculture. These principles have been employed for years to industry under receiverships, trusteeships and bankruptcy. While this section has saved hundreds and thousands of homes *many more* could have been saved if all the District Courts had *entered into the spirit of the Act.* This would have been of great benefit, not only to the nation, but to the creditors as well as to the farmer debtors.

In the *Bradford* case, 76 F. (2d) 628, Judge Parker of the Circuit Court of Appeals Fourth Circuit says:

"As a matter of fact, no property in any real sense is taken from the lienholder by reason of the provisions of the act. The mortgaged property has already shrunk in value before the proceedings under the act are instituted; and the proceedings merely scale down the secured portion of the debt to the value of the encumbered property and transfer the lien of the encumbrance to the proceeds of that property when paid into court. While the lienholder is delayed in getting his money, the delay is probably not for so long a time, or the loss

> so great, as would result to him if the act were not passed and wholesale foreclosures of real estate mortgages should result."

In the *Radford* case, 8 F. Supp. 489, Judge Simon of the Circuit Court of Appeals Sixth Circuit says:

> "It is true that the appellant will not be able to collect the face value of its mortgages, nor the accrued interest thereon. But this is a loss it has already sustained, not through the operation of the statute, but through the default, insolvency and bankruptcy of its debtor."

Surely, it does violence to the language of subsection (s) to hold that a court may dismiss the *petition* without liquidating the estate as provided for in this subsection. The very first sentence of subsection (s) says that *any farmer may ask to be adjudged a bankrupt.* This in case he *fails* to get the consent of a majority in number and amount of his creditors to consent to a composition and extension of time, or if he feels *aggrieved* by the composition or extension. It is not for the court to determine that question. Neither is it within the discretion of the court. *The farmer may—and the court must.*

Again, *the farmer may ask* that all of his property be appraised and his exemptions set aside to him and *he may ask that he be allowed to retain possession,* under the control of the court, of all or any part of the remainder of his property. *No room for dismissal here.* The provisions are *mandatory* upon the court to supervise and control the property.

Again, subsection (s) provides that the appraisers shall appraise all the debtor's property *"at its then fair and reasonable market value."* Congress *does not say* that the debtor *must pay all* of his debts. It says that he must pay

all of his debts *as far as the value of his property will pay them.*

Paragraph number (1) of subsection (s) is *mandatory,* and says the Referee *shall* issue an order setting aside to such debtor his exemptions and equity in exemptions, and *shall* further order *the possession* under the supervision and control of the court of any or all of the remainder of the debtor's property *to remain in the debtor. These provisions are clear and mandatory.* The court must perform the duties imposed upon it by Congress. The farmer debtor has a right to go through bankruptcy as provided for in Section 75.

In paragraph number (2) under subsection (s), the Act provides that *when* the conditions set forth *in Section 75* have been complied with, the court *shall—not may—stay all* judicial or official proceedings in any court or under the direction of any official *against the debtor* or *any of his property for a period of three years.* It provides that during such three years, the debtor shall be permitted to retain possession of all or any part of his property, provided he pays a reasonable rental, fixed by court.

This three year stay *does not require* that the farmer debtor's assets *exceed* his liabilities, or that he have an equity in his assets *over and above* his liabilities, or that he *convince* the court that he *can pay all* of his debts *within three* years, or that the court *without* evidence, except that it feels so inclined, *can say that he acted in bad faith.* No, the stay is *predictated* upon his *paying* the *rental* fixed by the court.

If the farmer debtor fails in the payment of the rental, or in the payment of additional amounts as ordered by the court, or disobeys orders of the court, abandons the property, or commits waste, *then* and then *only* may the

court liquidate the estate, in accordance with the provisions of this Section.

The provisions in this paragraph are mandatory on the part of the court. The farmer may not wish to select all of his property or any of it, but if he does, and pays the rental and complies with the other orders of the court, *then* the court *may not dismiss* the petition. In this paragraph are set forth the requirements of the debtor, and also the duties of the court.

Nothing in this paragraph, or any other, *permits* the court to *dismiss* the petition by saying that in its opinion the farmer is *not able* to rehabilitate himself. The test *of rehabilitation is his ability to pay the rental on the present value of the property.* The test *is not* whether he can pay his debts *in full. Nor yet* whether he owes *more than* he has assets.

Under this paragraph, the court may require additional rental, or payments on the principal, but such requirements must be made *not inconsistent* with the rights of the creditors and *the debtor's ability to pay with a view to his financial rehabilitation.* In other words, the court is to pass upon the *debtor's ability to pay* additional rental, but it is *not* to pass upon the *farmer debtor's right* to go through bankruptcy, *that right is given him by statute.*

Paragraph number (3) of subsection (s) provides that at the *end of three years,* or sooner, the debtor may pay to the court *the amount of the appraisal* of the property of which he retains possession, less the amount paid on principal. This provides that the debtor may shorten the period of three years by paying before the expiration. That is, if he is able to be refinanced before. It does *not* give to the court the right to shorten the period. That decision *rests with the farmer.*

It is true that whenever the farmer is ready to pay up to the value of the property, either he or the creditors may

ask for a reappraisal, or the court may set a date for a hearing to fix the then value of the property. But there is nothing in this Section that assumes that the farmer debtor is to pay *more than the value of the property* at the time when he is ready to pay.

It is also true that the Act provides that upon written request, any secured creditor or creditors, may ask that the property on which they have a lien be sold at public auction. But it is a *violent assumption* to assume that any creditor *would bid more* than the property is worth.

Any creditor bidding *more* because of vengeance, *would be guilty of bad faith,* and the court of equity should in such a case refuse to *confirm* the sale. By inserting this provision in the Act, Congress intended to protect the creditor or creditors, but it *did not intend* to give them an instrument *for vengeance* with which *to destroy a home.* No *decent* creditor would think of such a thing.

This paragraph then provides how the court *may liquidate, not dismiss,* the farmer's estate, if he at any time fails to comply with the provisions of Section 75 or with any orders of the court made pursuant to this Section, or if he is *unable* to refinance himself *within three years.*

Justice Brandeis' Opinion.

It was these provisions, under which the District Court may cut the stay short of three years and liquidate the farmer debtor, that Justice Brandeis had in mind when he said in the *Robert Page Wright* case that the stay was not absolute. We quote from the opinion:

> "Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession" (300 U. S. 440).

No amount of attempted misinterpretation of Judge Brandeis' opinion in the *Robert Page Wright* case can overcome the logic set forth in his opinion and in subsequent opinions of this Court. We shall discuss these decisions further when we answer the appellant's specifications and assignments of errors.

The paragraph numbered (4) of subsection (s), there is very little that has any bearing upon this case, except that part which says that "if at the time the farmer debtor amends his petition or answer asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver *shall be divested of possession* and the property *returned to the possession of such farmer*, under the provisions of this Act."

This clearly indicates that the provisions are mandatory, and that the court *cannot dismiss* the petition. It shows clearly *that Congress intended* that the farmer should remain in *possession undisturbed for a period of three years*, provided he pays the rental and otherwise complies with the order of the court, and complies with the other provisions of the Act.

There is nothing of importance in paragraphs numbered (5) and (6) of subsection (s), except that it further carries out our contention that the court cannot dismiss or deny to farmer debtors the right to go through bankruptcy because *they are too poor*, or because *their assets do not equal their liabilities*, or that the court in its discretion may determine that a farmer *cannot* be rehabilitated within three years, or that he is *unable* to be refinanced, or is *unable* to pay the *value* of the property *within three years*.

Such is an arbitrary assumption, unwarranted by anything in Section 75. It is an abuse of discretion. We repeat that the stay of three years is not absolute, but Section 75

itself provides the conditions under which it can be terminated, *not by dismissal* but *by liquidation* of the estate.

"When a statute is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. If the meaning of a statute is plain, and its provisions are susceptible of but one interpretation, its consequences, if objectionable, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action; the wisdom or policy of the law, the motives that prompted its enactment and the reasonableness or justice of its provisions cannot be taken into consideration by the courts in construing the statute." And cases there cited, 25 R. C. L., Statutes, § 255.

"The liberal rule of construction only requires that a statute be so enforced as to carry into effect the will of the legislature as expressed in the terms thereof, and to give, not stintedly or niggardly, but freely and generously, all the statute purports to give. It does not, however, warrant an extension of the statute to the suppression of supposed evils or effectuation of conjectural objects and purposes, neither referred to nor indicated by any terms used not clearly within the spirit of the legislation." And cases there cited, 25 R. C. L., Statutes, § 298.

"Statutes must have a rational interpretation, to be collected not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals. * * * A remedial statute must be construed liberally so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant." And cases there cited, 25 R. C. L., Statutes, Section 299.

Answering Appellant's Specifications.

We shall now briefly answer each of appellant's six specifications of assigned errors. We shall also answer the arguments made by appellant under each specification.

First and Fourth.

For the purpose of brevity we shall answer appellant's first and fourth specifications together, because they both claim that the decision of the Circuit Court below is in conflict with the decision of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank* (300 U. S. 440).

Answer, Nothing could be further from the fact. The truth is that the decision of the Circuit Court of Appeals below is in harmony with the decision of this Court in the case of *Wright* v. *Vinton Branch Bank.* The court correctly construed, interpreted and applied the statute in accordance with the construction, interpretation and application made by the Supreme Court of the United States in the *Wright* case. In the *Wright* case *the farmer debtor owed $6,559.50 and his assets were only $2,828.52.* In the present case the *farmer debtor owes $8,195.37* and his assets, including personal property, *are in the neighborhood of $15,000* (R. 71 to 90, inclusive, and R. 95 and 96).

We again quote from Justice Brandeis' opinion:

> "Whether in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, *we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession.* • • • But we are of the opinion that, while the Act affords the debtor, *ordinarily, a three-year period of rehabilitation,* the stay provided for is not an absolute one; • • •"

Again:

"The mortgagor's right to retain possession during the stay is specifically limited by paragraph 3, which provides:

"'If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.'

"Thus, for example, the debtor's *tenure* under the stay *is subject to the requirement that he pay 'a reasonable rental* semi-annually for that part of the property of which he retains possession.' Under the last-quoted provision of Paragraph 3, if the debtor defaults in this obligation 'at any time,' the court may thereupon order the property sold."

Justice Brandeis then recites Paragraph 2 of 75 (s) which provides that the court, in addition to the rental, may require payments on the principal due and owing to the creditors, and then says:

"Paragraph 3 authorizes the court to have the property sold if 'at any time' the debtor should fail to comply with orders of the court issued under its power to require interim payments on principal, or otherwise in the course of its 'supervision and control' of his possession."

Again the able justice says:

"This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."

But here the justice is discussing the *limitations and restrictions* of the Act. He is *not sanctioning arbitrary dis-*

missals by District Courts in *violation of the plain language of the statute.* At the outset of the opinion in the *Wright* case we find this language:

> "But while we must decide whether the challenged subsection is constitutional, *we refrain from deciding questions suggested which may arise later in the course of its administration.*
>
> "Second. The decision in the Radford case (pp. 1602, 1604) did *not question the power of Congress* to offer to *distressed farmers the aid of a means* of rehabilitation under the bankruptcy clause."

Appellant under its first specification says that relief under Section 75 (s) may be obtained only by one who has made a *bona fide* attempt and has failed to effect a composition under Section 75 (a) to (r). That a debtor proceeding under Section 75 of the Bankruptcy Act will be halted at the outset if the debtor is beyond all reasonable hope of financial rehabilitation.

We challenge appellant to point to anything *justifying that conclusion* under *any provision of Section* 75 (a) to (s), inclusive. We challenge appellant *to produce any statement justifying that conclusion* in the opinion of the Supreme Court in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440.

The challenge *will not be met* because there is nothing of the kind either in the Act or in the opinion of the court. The Act *itself provides the test* of rehabilitation. First, *payment of rent.* Secondly, *additional payments*, if required. Thirdly, *the complying* with *the orders* of the court. Good faith is presumed.

Footnotes.

Counsel for appellant may argue that he found something to that effect in the footnotes of the opinion in the

Wright v. *Vinton Branch Bank* case, but we are more concerned with headnotes than with footnotes. *Footnotes are not part of the opinion.* Footnotes may *explain* and *clarify* —give backing and authority to an opinion, but *are not* in *any* sense *part* of the opinion. Surely *"obiter dicta"* in a footnote does not become the law of the case.

Surely no one will contend that all the suggestions and propositions laid down in the cases cited in the footnotes in the *Wright* case are *sanctioned* and *approved* by the court and *made part* of the opinion. They are not even *"obiter dicta". The opinion speaks for itself.* The footnotes *explain* and are given simply for the purpose of *amplifying* and *backing* up the reasoning in the decision. But we repeat, they are *not* the decision nor yet *part* of the decision.

Majority Opinion.

In the majority opinion in the *Bartels* case, the case at bar, the court correctly says:

> "The courts have spoken of a lack of 'good faith' in invoking Section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case of Wright *v.* Vinton Branch Bank, *supra. We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made a requirement of the initiation* of a proceeding under Sect. 75. That requirement appears in Sect. 74 (a), 11 U. S. C. A., Sec. 202 (a). Section 75 *nowhere mentions initial 'good faith' as a prerequisite* to invoking Subsection (s), or going through bankruptcy if rehabilitation under that Subsection fails. The *good faith* of the offer and acceptance is to *be enquired into* by the court *before confirming* a composition or extension accepted by the majority of creditors, Subsection (i), 11 U. S. C. A., Sec. 203 (i) and that is the *only mention* of good faith in Sec. 75."

Second and Third.

We shall also answer appellant's second and third specifications together because they cover the same ground. Appellant seems distressed because the Circuit Court of Appeals decided the same issue in different cases differently on the same day. They are aggrieved because the court in the *Bartels* case, the case at bar, *did not follow the erroneous "obiter dicta"* in the *decision* in the *Baxster* and the *John Beverly Henderson* cases.

The truth is that there were four Circuit Judges; two who were familiar with Section 75 and with the Supreme Court's decisions in the *Virginia Wright*, the *Beach*, the *Adair* and in the *Indiana Wright* cases, while the other two were not so familiar with either the Act or the decisions. That being the case, the result of the decisions in these three cases depended upon how these judges were assigned. Anyway it is *not only laudable and permissive*, but it is the *duty* of a court to *correct its own erroneous* decision.

It is not the function of Congress to correct judicial error. *Courts themselves have and will continue to do that.* A wise man changes his mind. So does a wise court. The decision in the *Bartels* case *is the correct decision.* It is supported by equity, justice, reason and logic. The question is not so much as to what the decisions of a court have been as what *they ought* to be.

Fifth and Sixth.

We shall now take up appellant's fifth and sixth specifications. These two specifications cover the same ground, the sixth being simply a rehash of the fifth. In all these specifications appellant claims that the District Court was justified in setting aside the adjudication and dismissing the farmer debtor's petition under Section 75. First, because the farmer debtor had no equity in the farm, and therefore the petition

was not filed in good faith in a *bona fide* effort to obtain a composition and extension of time. Secondly, because there was no reasonable hope of the debtor's financial rehabilitation.

> "For the farmer debtor to rehabilitate himself financially within the meaning of Section 75 (s), *it is only necessary* that the debtor *shall be able*, during the statutory period of the moratorium, *to pay a fair rental upon the property which he retains*, and within such period put himself in a position to pay for said property at its appraised value; that he may not be able within such period to pay his debts in full is immaterial." Syllabus In re Anderson, 23 Fed. Supp. 854.
>
> "A farmer can file a petition under Section 75 (s) setting forth that he was unable to obtain the acceptance of the majority in number and amount of all creditors to his extension proposal and he will not be allowed to amend his petition and be adjudged a bankrupt." Syllabus In re Garman, 25 Fed. Supp. 758.

No Equity in His Farm.

The assertion that the farmer debtor, Mr. Bartels, has no equity in his farm *is not borne out by the evidence*. But even if this were true, *which it is not*, the fact is that Section 75 *gives every farmer*, who is insolvent or financially embarrassed, *a legal equity in his farm*. That equity *is the legal right to continue in possession* of his farm—live in his home—*for three years, provided he complies* with the orders of the court, *pays a reasonable rental*, and additional payments, if so ordered by the court. That equity gives him an opportunity to refinance and reestablish himself as a solvent rather than as an insolvent farmer.

That equity is analogous to the equity of redemption now existing in many States. In North Dakota and in other States the farmer has a period of one year in which to redeem from a mortgage foreclosure sale. During that year

he has a right of possession and *is entitled to the rents and profits.*' That is an equity that even insurance companies *must* and *do* respect. This equity of redemption *does not depend* upon *good* or *bad* faith. It does not depend upon whether one is a Christian or a horsethief. It is a *legal right* given to *every owner* of real estate.

No State or Federal Court *has ever* attempted to defeat the equity of redemption by holding that if the person's liabilities *exceed* his assets that then, he is *not acting* in good faith, and, therefore, *not entitled to possession and the right of redemption.* No court, either state or federal, *has ever yet held* that the person who wishes to take advantage of the "equity of redemption" would have to *convince* the court, *in advance,* that he would *be able not only to redeem but to pay all* of his indebtedness. Such a decision would be considered absurd.

Equally absurd are the decisions that hold that under Section 75 a farmer *must show* that his assets *exceed* his liabilities, or else his petition will be held to have been filed in bad faith. Doubly absurd are the decisions that hold that the farmer *must convince* the court, *three years in advance,* that he *will be able* to refinance himself at the end of three years, and *not only pay the market value* for his property *but all he owes.* Such a holding, whether deliberate or otherwise, annuls an Act of Congress, *not because* it is *unconstitutional but because of judicial legislation.* The Supreme Court of the United States *has never given* its approval to any such decisions. We are satisfied *it never will.*

Under Section 75, by expressed terms, the farmer has *a stay of proceeding, a right of possession,* that is similar to an equity of redemption for *three years.* This stay, of course, can be cut short if he fails to pay the reasonable rental, plus such additional payments as ordered by the court. The mere fact that the provisions of Section 75

have been emasculated by some District Courts *does not change the intent of Congress, or the language* of Section 75. We feel confident that the Supreme Court in this case *will once and for all* set these District Courts right.

The right that Section 75 gives to the farmer to remain in possession *for three years* upon paying a reasonable rental is a property right. It is an equity which Congress gave him. It does not depend upon judicial discretion. During that three years the farmer may refinance and rehabilitate himself financially. It was the *hope of Congress* and *it is the hope of the farmer* that during those three years *he might be able* to refinance and rehabilitate himself. That hope *no court may cut short* unless he fails to pay his rental or comply with the lawful orders of the court.

> "Property is *nomen generalissimum*, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporal hereditaments," 179 U. S. 141. "The right to redeem from a chattel mortgage is a right of property passing to the trustee of the bankrupt mortgagor." James B. Drake & Sons *v.* Nickerson, 121 A. 86.

However, in addition to the legal equity given by Section 75, Mr. Bartels *has financial equity over and above his indebtedness* in his farm. This is shown by the testimony of Ed Bounds, a building constructor (R. 71 and 72), Gus Becker, a real estate man (R. 77 to 80, inc.), Silver Whitsett, County Agricultural Agent (R. 73 to 75, inc.), Hugh Donegan, an insurance man (R. 75 and 80), Albert Vogel, a real estate man (R. 81 and 82), August Bernherd (R. 83 and 84), M. D. Baker, manager, cotton oil company (R. 85 to 88, inc.), and Mr. Bartels, respondent (R. 8, 31, 71, 72, 95 and 96).

Mr. Bartels' total indebtedness, as shown by the record, is $10,295.30 (R. 4 and 9). Even at the present *low values*

the evidence shows that his farm and other real estate, farm implements, livestock and accounts, including his household goods, are of the reasonable value of $15,000 or $16,000.

According to Mr. Bartels' testimony, *he paid $200* an acre or *$20,000* for this farm. According to the testimony of Mr. Whitsett, the County Agricultural Agent, the farm ought to produce or bring *in $100 a month.* That would be six per cent on a valuation of $20,000. We are very much afraid it isn't the lack of an equity but the desire to grab an equity on the part of the appellant. The bad faith is not upon Mr. Bartels but may rest elsewhere.

> "A farmer's proceedings for agricultural compositions and extensions were not dismissible as against mortgages who, after confirmation of foreclosure sale, held certificates of purchase, where farmer was still in possession of land, deeds had not been issued to purchasers, and District Judge had entered order approving filing of petition, and, if there was good reason why land could not be administered in bankruptcy court, Bankruptcy Act provided a remedy to true owner (Bankr. Act Sec. 75 (n-P), 11 U. S. C. A., Sec. 203 (n-p)." Syllabus, Wilcons *v.* Penn Mut. Life Ins. Co. et al. (C. C. A. 10th C.), 91 F. (2d) 417. See also Heldstab *v.* Equitable Life Assur. Soc. of U. S. et al. (C. C. A. 10th C.), 91 F. (2d) 655.

In the *Virginia Wright* case, 300 U. S. 440, the record discloses that the petitioner's obligation amounted to *$6,559.50* while the value of all his property amounted to only *$2,822.50.* In that case the Supreme Court *did not* hold Section 75 (s) unconstitutional, *because it gave* Mr. Wright *three years* within which to *pay the value* of the farm, but, on the contrary, held it constitutional. In that case the Court says:

> "A court of bankruptcy *may affect* the interests of lien holders in many ways. To carry out the purposes

of the Bankruptcy Act, it *may direct* that *all liens* upon property forming part of a bankrupt's estate *be marshalled;* or that the property *be sold free of encumbrances* and the rights of all lien holders be transferred to the proceeds of the sale. Van Huffel *v.* Harkelrode, 284 U. S. 225, 227 (p. 1604). *Despite* the peremptory terms of a *pledge,* it *may enjoin sale* of the collateral, if it finds that the sale would *hinder or delay* preparation or consummation of a *plan of reorganization.* Continental Illinois National Bank & Trust Co. *v.* Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648, 680-681 (pp. 1502, 1802, 2230.08). It *may enjoin like action* by a mortgagee which would *defeat the purpose of subsection (s) to effect rehabilitation of the farmer mortgagor.*"

Beach Case.

In the *First National Bank & Trust Company of Bridgeport, Connecticut, v. Francis E. Beach,* 301 U. S. 435, the debtor had a mortgage of *$100,000* on 196 acres of land. The Supreme Court of the United States *did not dismiss* the action, but *declared* him to be *a farmer in good faith.*

"*The products of his toil were food for him and his dependents, and the farmhouse was a home. True, the money returns were scanty.* To some extent this was so because of the blight which fell upon his apple orchard in 1932 or later, cutting down the revenues yield from that source. The scantiness of the yield may have turned him into a bankrupt, but it did not change his occupation. One does not cease to be a farmer because drought or wind or pest may have rendered the farm barren. The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable, 'the major portion of his time'. * * * A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns on his investment, while not enough to keep

him going, are larger, none the less, than the profits of his labor."

The Supreme Court *did not throw* Mr. Beach *out* of court. It *sustained* the Circuit Court of Appeals, and held that Mr. Beach *was entitled to the benefits* of the Act, no matter how meager his income. *The fact that he owed $100,000,* and his *assets were only 196* acres of land, *did not prevent* the Supreme Court from *declaring him a farmer in good faith.*

Adair Case.

In the case of *Adair* v. *Bank of America National Trust & Savings Association* (Cal.), 303 U. S. 350, the Supreme Court reversed the Circuit Court of Appeals and held that the Conciliation Commissioner was justified in selling mortgaged property to pay the expenses of harvesting grapes. The expenses included wages for the farmer debtor. The Supreme Court *did not suggest* that the farmer who *did not have any money, nor feed for his horse, was too poor* to go through bankruptcy under Section 75, *nor that he was in bad faith* and that the case should, therefore, have been dismissed. The court says:

> *"These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."*
>
> Again "the argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by receiver or trustee would be. *This is not true.* The mortgagor is in default, *but it is not therefore to be assumed that he is a wrongdoer* or *incompetent to conduct farming operations.* The legislation is *designed to aid victims* of the general economic depression. The mortgagor is familiar with the property and presumably vitally interested in preserving ownership thereof and ready to

exert himself to the utmost to that end. It is not unreasonable to assume that under these circumstances, the interests of all concerned *will be better served* by leaving him *in possession* than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or a trustee and there is probably a saving of expense. In order to protect the creditor's interests, the possession is at all times subject to the supervision and control of the court; and if the debtor 'at any time' *fails to comply with orders of the court* issued in the exercise of its supervisory power to *protect* the mortgagee *against waste or other abuse* of his possession by the mortgagor, the court may order the property sold." *Robert Page Wright* v. *Vinton Branch, Mountain Trust Bank*, 300 U. S. 440.

The court, in the case of *Naylor* v. *Cantley*, 96 F. (2d) 761, in holding that when a petition under Section 75 had been filed, the bankruptcy court had exclusive jurisdiction of the bankrupt's property, said:

"Since, under the provisions of section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court *could not surrender its jurisdiction* to any other court, it *was incumbent* upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75 of the Bankruptcy Act. Bradford *v.* Fahey, 4 Cir., 76 F. (2d) 628; In re O'Brien, 2 Cir., 79 F. (2d) 715; United States National Bank of Omaha, Neb., *v.* Pamp, 8 Cir., 83 F. (2d) 493; Hoyd *v.* Citizens Bank of Albany Co., 6 Cir., 89 F. (2d) 105."

See also:

Isaacs v. *Hobbs*, 282 U. S. 734, 739 (1931);

Gross v. *Irving Trust*, 289 U. S. 342, 344 (1933).

James Wright Case.

The purpose of Congress in enacting this law is very clearly expressed in the case of *Wright* v. *Union Central Life*, 304 U. S. 502, where the court, speaking through Justice Reed, said:

> "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive, indebtedness and permitting him to start afresh. By the Act of March 3, 1933, 11 U. S. C. A., Sec. 201, *et seq.*, *the Congress deliberately undertook the rehabilitation of the debtor as well as his discharge from indebtedness.* This legislation for rehabilitation has been upheld as within the subject of bankruptcies."
>
> . . . . . .
>
> "The mortgage contract was made *subject to constitutional power* in the Congress to legislate on the subject of bankruptcies. *Impliedly*, this was written into the contract between petitioner and respondent. 'Not only are existing laws read into contracts in order to fix obligations as between the parties, *but the reservation of essential attributes of sovereign power is also read into contracts* as a postulate of the legal order.' And the fact that in this case the purchaser at the foreclosure sale was also the mortgagee is not a determining factor. Any purchaser at a judicial sale must purchase subject to the possibility of the exercise of the bankruptcy power in a manner consonant with the Fifth Amendment."

See also:

In re Slaughter, 12 Fed. Supp. 206;
Campbell v. *Alleghany Corporation*, 75 F. (2d) 947.

In the recent case of *In re Anderson*, 23 Fed. Supp. 854, Judge Wham said:

> "Yet I think it was in the mind of Congress that the secured creditor would ordinarily be willing to accept

the fair cash value of its security in lieu thereof; that the farmer to rehabilitate himself should be compelled only to refinance the reasonable value of the encumbered property and not to be compelled to pay the entire encumbrance, if it exceeded the value of the security.

"Otherwise, the act, meant to meet a great crisis among the farmers, would be helpful in comparatively few cases. It is generally known that, after the slump in farm values, large numbers of farmers with mortgaged farms awoke to find themselves with their farms mortgaged far beyond their value though there had been an ample margin of safety when the encumbrances were placed on the farms. *It was with a purpose to relieve against such situations and, if possible, to enable the farmer and creditor to adapt themselves to the conditions caused by the radically lowered values so the farmer could save his farm and the creditor get the full value of his security, that Section 75 was enacted.*"

A Mortgage Not Sacred.

"The fact that secured debts are affected by the act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the Constitution of the United States is concerned, *a no more sacred kind of property than an unsecured debt,* * * * and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies.'" *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947. See also *In re Burgh*, 7 Fed. Supp. 184, 185; *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648.

Congress Not Satisfied.

That Congress is fully aware of the fact that some District Courts have not given full force and effect to Section 75, but have attempted to annul some of its provisions, is

clearly shown by the Reports of the Judiciary Committee of both House and Senate.

> "These amendments have become necessary because of the great confusion caused by the diverse rulings of the various United States district courts, in the construction of section 75. Some courts have held that the farmer debtor could not take advantage of the act after foreclosure sale, and during the period of redemption. Some of these courts have refused to permit the farmer in that position to file his petition, although under the law of the State, he was in possession and full control of the property, and could redeem it within the period allowed. Other courts have held that the farmer could not take advantage of the act during the period of a moratorium established by a State; while others have held that the debtor could not take advantage of the act after sale, but prior to confirmation of sale, although in all of these cases, if the debtor had the money, and were in a position to pay, he could redeem and save his property.
>
> "Obviously, these courts are reasoning too technically, and have failed to carry out the intention of Congress, which was to protect the farmer's property and home. Other courts have just held the opposite, and have given full protection, and carried out the intent of Congress. There should be uniformity. • • •"
> Senate Judiciary Committee Report, May 13, 1935, 74th Congress, 1st Session, Senate Report No. 985.

To the same effect is the Report of the House Judiciary Committee, August 16, 1935, 74th Congress, 1st Session, House of Representatives Report No. 1808.

There is now pending in Congress S. 1935 and H. R. 7528, a bill which extends the provisions of Section 75 to March 4, 1944, and which amends Section 75 in other respects. This Bill was reported favorably without a dissenting vote by the Judiciary Committee of the Senate. This Report again sets forth the congressional intention. We quote:

"It was the intent of Congress, when it passed section 75, that the stay should be for 3 years provided the farmer complied with the provisions of the act and paid the rental as fixed by the court and complied with the orders of the court.

"It was never the intention of Congress that the court should arbitrarily dismiss the farmer's petition because it, the court, decided that the farmer could not pay all of his debts at the end of 3 years or that he was too poor to go through bankruptcy. The intent of Congress was, and is, that the farmer-debtor is to pay the rental and have 3 years not to pay all of his debts but to pay the value of the property. Very few bankrupts are able to pay all their debts.

"This new provision simply corrects abuses of judicial discretion. It prevents judicial legislation. We may state further that many of the district courts and some of the circuit courts of appeals and the Supreme Court have given a proper construction of the language in the present act, but we are sorry to note that others have misconstrued it.

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"'The objection of section 75 is to save and protect the farmer's home and farm. Obviously that cannot be done if the mortgagee says "I do not care what the value is. I will bid the full amount of the mortgage." Vengeance and hatred should not be permitted by Congress or by courts when it has for its object the destruction of a home.

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"Surely a mortgagee should not object to this. He is not entitled to more than the value of the property and cannot get any more under any conditions even if he takes the property, unless he wishes simply to bid for vengeance.

"Again, the last sentence of subsection (f) is new language. It reads:

"But, except as otherwise herein provided, the court shall not dismiss the proceedings without complete liquidation and discharge of the farmer-debtor.

"This is simply clarifying language. That was the intention of Congress in the present section 75. Surely the practice now followed by some of the district courts, where they permit the farmer to file his petition and to proceed under the act for one year or more and then upon the motion of some mortgagee dismiss the proceedings and throw the farmer to the wolves, is unjustifiable.

"When a farmer files his petition under this section he is a bankrupt and he should be completely liquidated and discharged of his debts at the end of 3 years, or sooner, if he violates any of the provisions of this act or if he fails to pay his rental or comply with the lawful orders of the court. But his petition should never be dismissed, at least not without his consent and that of his creditors. The court once having obtained jurisdiction should continue jurisdiction and liquidation under the provisions of this section.

. . . . . .

"The law is extended for 4 years. There is no valid reason why it should not be. If it is a good law, and that is no longer under serious dispute, then it should certainly be extended for at least 4 years. By that time the agricultural problem may be solved.

"The legislation is on the subject of bankruptcy. The only farmer who can take advantage of this law is a bankrupt farmer. A bankrupt is a financial wreck. He is a bankrupt because he cannot pay all of his obligations. The question is one of salvaging, saving what can be saved out of the wreck.

"In legislating on this subject it is just as much the duty of Congress and of the courts to consider the unfortunate debtor as it is to consider the unfortunate creditor. Perhaps due to no fault of either the debtor or the creditor the farming venture in which they both had confidence has been dashed upon the rocks. (See *In re Klein*, 1 Howard 279.)

. . . . . .

"When Congress passed the present Section 75 they provided for a public sale, in case the mortgagee was

not satisfied with the appraisal, the reappraisal, or the determination of the value of the property by the court upon evidence. It would have been a violent assumption if anyone had assumed that any mortgagee would deliberately bid more than the property was worth in order to wreck a home.

"Yet, some mortgagees have persistently proclaimed in and out of court that they would bid the full amount of their mortgage, plus interest, taxes, and foreclosure expenses. The truth is that in some cases the farm owners were thus deprived of their home, and the property later sold to strangers for far less than the amount of the mortgage, interest, and taxes. Fairness would have at least suggested that the original owners be given an equal chance.

"Whatever the motive for such procedure it must be condemned. It seems that the courts should have assumed their equitable jurisdiction and in such cases should have refused to confirm the sale because the mortgagee stood before that court with unclean hands. The future and the stability of our Government depends upon homes and not upon the wrecking of them.

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"The third material change in language is the provision that the court shall not dismiss the proceedings without complete liquidation and discharge of the farmer-debtor. This was the intention of Congress as expressed in clear language in the present section 75 but, because of the decisions of some courts, it has become necessary to restate it in more emphatic language.

"Some of the courts hold that unless the farmer can prove to them that he can pay "all of his debts" by the end of 3 years that then his petition "lacks good faith." One court dismissed 95 cases without giving a single farmer an opportunity to be heard, the judge simply stating that these farmers could "never pay all of their debts." The act does not say "all of their debts," it says the "value of the property" is what the farmer will have to pay.

"We are glad to note that in the *John Hancock Mutual Life Insurance Company* v. *Benno Bartels*, recently decided, the Circuit Court in the Fifth Circuit refused to follow those decisions. That court, in discussing this matter, says in part:

"The courts have spoken of a lack of "good faith" in invoking section 75 as a cause for dismissing the whole proceeding, and some countenance has been given the idea in a footnote to the opinion in the case of *Wright* v. *Vinton Bank, supra.* We do not understand it to be a part of the court's opinion. The note mistakenly states that good faith is made a requirement of the initiation of a proceeding under section 75. That requirement appears in section 74 (a) (11 U. S. C. A., sec. 202 (a)). Section 75 nowhere mentions initial "good faith" as a prerequisite to invoking subsection (s), or going through bankruptcy, if rehabilitation under that subsection fails. The good faith of the offer and acceptance is to be inquired into by the court before confirming a composition or extension accepted by the majority of creditors (11 U. S. C. A., sec. 203 (i)), and that is the only mention of good faith in section 75.

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"No one can deny that the agricultural situation is still acute, owing to low prices and crop failures. No one can deny but that agriculture is the basic industry of the Nation. Congressional efforts should not be restricted but should receive liberal interpretation. We feel that this legislation is much needed and highly desirable and for the good of the Nation."

Report of Senate Judiciary Committee, August 1, 1939, Senate Report No. 1045.

Summary of Issues.

We shall here enumerate the issues raised in this case, which issues we feel the public good require this Court to dispose of *once and for all.*

One.

May the District Court dismiss a petition because it finds that the farmer debtor's liabilities exceed his assets? *We respectfully submit it may not.* In any bankruptcy proceeding the liabilities *generally exceed* the assets, but courts *may not* refuse the petitioner the benefits of the Bankruptcy Act for that reason and dismiss the petition. When Congress passed Section 75 it *knew* that *95* out of every 100 farmers who would take advantage of the Act would have *more* debts than assets.

Two.

May the District Court dismiss the farmer debtor's petition because the court feels that he will not be able to refinance or rehabilitate himself within three years and, therefore, is not in good faith? Again, we say, *emphatically, it may not.* Section 75 requires the farmer to pay a rental and to comply with the orders of the court. The *payment* of the *rental* and *complying* with the court's orders *is the test.* While the stay is not absolute the provisions by which it may be shortened are in *the statute itself* and *not* in the judgment of the court.

Three.

May the lower court dismiss the farmer debtor's petition because he fails to convince the court, *three years in advance,* that he will be able to pay all of his debts in full? That position is absurd, yet, we regret that that is the holding of some of the District Courts. It shows an entire lack of understanding, not only of the agricultural problem but of the intent of Congress as expressed in plain, simple, English language.

FOUR.

May the District Court dismiss a farmer debtor's petition because in his proposal for a composition or an extension of time he offers to pay to his creditors the proceeds of the products produced by his labor out of the soil of his farm—the farm income? *We submit it may not.* What *more* can a farmer offer than the income from his farm, or *what more can a creditor get out of a farm?* A farmer is not a banker nor is a farm a bank. What the farm produces is all that anyone can get out of a farm.

Again Congress *knew* that *95* out of every 100 farmers who would take advantage of Section 75 would be insolvent and that the only thing they could offer would be the products produced by their labor. *This is not because of the farmer's fault,* but because he was made to feed and clothe the nation *below the cost of production.*

Disposal of These Issues Vital.

May we, therefore, again respectfully request that the Court in its opinion dispose of *each and all of these issues.* Otherwise the decision will simply be another decision and the *confusion* among the District Courts *continue.* We are confident that if these issues are disposed of in this case a great deal of litigation *will be avoided.* Congress will also be spared the embarrassment of continually correcting the erroneous decisions of the District Court by legislative enactment.

Conclusion.

In conclusion permit us to state that we feel that Section 75 of the Bankruptcy Act is entitled to the same generous and liberal treatment at the hands of the District Courts that has been given to Sections 74, 77 and 77b. In accordance with the provisions of Section 75 *it is the duty* of the

District Courts *to continue a farm as a going concern.* We repeat, there is nothing unusual in Section 75. It simply applies well established principles of bankruptcy law to agriculture.

This may appear novel to some District Courts but there is no provision in Section 75 that the Bankruptcy Courts of this nation *have not already made use* of in some cases. The courts have allowed going concerns to remain in possession, and to continue in business under trustees, and without trustees. They have permitted possession and the payment of indebtedness of such concerns on the installment plan, with or without interest. *In re Reiman,* 7 Ben. 445, Fed. Cas. 11673; *Sparhawk* v. *Yerkes,* 142 U. S. 114; *In re Swofford Co.,* 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459; *In re Merkus,* 289 Fed. 732 (C. C. A. 2nd); *Traer* v. *Clews,* 115 U. S. 528; *Van Huffel* v. *Harkelrode,* 284 U. S. 225.

Sections 75, 77 and 77B of the Bankruptcy Act *mark a new epoch.* From *now on,* in the *interest* of the *public,* property and wealth will be *conserved* in the hands of *those who created it*—not destroyed. The debtor will be considered *as well* as the creditor. The bankruptcy act is going *to become* an act of *conservation* and *not* an act of wreckage.

During the depression and recession Congress—legislating in the interest of the Nation—saw fit to pass the sections referred to. It did this because it felt they were essential for the preservation of the Nation. This Court has approved that legislation and has given it a broad and liberal interpretation so as to effectuate the intent of Congress within constitutional limitations. *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island, and Pacific Ry.,* 294 U. S. 648; *Robert Page Wright* v. *Vinton Branch of Mountain Trust Bank,* 300 U. S. 440; *Adair* v. *Bank of America National Trust and Savings Association,* 303 U. S. 350.

The Frazier-Lemke Amendment to the Bankruptcy Act does not take any property from the creditors. It gives to the creditors *all of the past efforts, earnings and accumulations of the debtor, his wife and his children,* but it does at the same time *prevent* them from taking the future earnings and accumulations of the debtor, his wife and his children. It deprives the creditors of nothing, but *does prevent* them from *destroying* all value by throwing more farm land and farm property upon the market. It *conserves* the home and property for those *who created and accumulated it,* subject to existing liens up to the par value as judicially determined under the provisions of the Act.

This amendment is a conservation act. Nobody loses anything—it conserves property and values. The creditors will get the present value of the property—that is all they could get before this amendment was enacted or that they are entitled to. In fact they will get more under this amendment than they ever would get by wrecking another million farm homes and destroying all values. The agricultural wealth of this nation can and will be preserved in the hands of those who created it—the farmers.

This is a case in bankruptcy. The legislation in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this Act is *a bankrupt farmer.* A bankrupt is a financial wreck. The question of interest and profits in bankruptcy proceedings is generally out of the question. *The question is one of salvaging, saving what can be saved out of the wreck.* In legislating on this subject, it is just as much the duty of Congress to consider the *unfortunate debtor,* as to consider the unfortunate creditor.

Section 75 is legislation in behalf of the public welfare. Over 66 per cent of all the farms of this nation are mortgaged (The World Almanac, 1937, p. 346). Due to low

prices, drouth and other adverse conditions over *170 farmers* out of every thousand lost their farms by mortgage foreclosure, bankruptcy, judgment or tax sales, from March 15, 1933, to March 15, 1937 (Circular No. 417, Department of Agriculture and February, 1938, Circular, Bureau of Economics).

That means that in a period of four years 1,020,000 farmers out of 6,000,000 farm families lost their farms. *That is the problem* that Congress dealt with in Section 75 and *will continue* to deal with. In the solution of that problem the District Courts must do their part. They must not obstruct remedial legislation by misinterpretation—by reading something into Section 75 that is not there.

The power of the executive, the judicial and the legislative branches of government are all derived from that same Constitution, and each of these three coordinate branches of our government must respect the power of the other, under the Constitution. *Johnson* v. *United States*, 163 Fed. 30, 32, C. C. A.

Obviously, if without redress the 94 District Courts are permitted to ignore the plain language of an Act of Congress and read their own ideas into the Act then there is nothing to prevent judicial legislation—the encroachment of one branch of the Government upon another.

Respectfully submitted,

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